Court of Appeals No. 49087-1-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

CHUNYK & CONLEY/QUAD-C,

Plaintiff/Appellant.

v.

PATTI C. BOETTGER,

Defendant/Respondent.

APPELLANT CHUNYK & CONLEY/QUAD-C'S OPENING BRIEF

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I. INTRODUCTION

This appeal originates from a jury trial in Pierce County, which was an administrative appeal from a Board of Industrial Insurance Appeals' (hereinafter "Board") Proposed Decision and Order, dated June 27, 2013, and their final Decision and Order dated September 6, 2013. The Board's decision concluded that defendant/respondent claimant Patti Boettger was a temporarily totally disabled worker from October 24, 2006 through September 27, 2010, and is entitled to time-loss benefits for that time period. As a result of a material fact being withheld from the jury during trial due to the trial court's evidentiary rulings, the jury rendered a verdict in favor of Ms. Boettger.

There are two central issues in this appeal. First, whether the trial court's exclusions of the material fact that Ms. Boettger was not temporarily totally disabled from August 19, 2006 to October 23, 2006, the days and weeks before the time loss period at issue, was an abuse of discretion. The trial court denied plaintiff/appellant employer Chunyk & Conley/Quad-C's (hereinafter "Quad-C") pre-trial motion to either admit a prior jury verdict form as an exhibit or to amend the Board's Findings of Fact to include the established fact that Ms. Boettger was not temporarily totally disabled on and before October 23, 2006. The trial court also rejected their proposed jury instructions to instruct the jury on this issue. Quad-C moved to allow this evidence and/or instructions because a prior

jury verdict emanating from the same industrial injuries found that Ms. Boettger was not temporarily totally disabled in the time period just prior to her current claim for time loss. Thus, that first jury had already established a fact – accepted by the Department of Labor and Industries (hereinafter "Department"). This fact became the law of the case and mandated that this second jury be informed of that procedural history and material fact, *which the Board knew when they rendered their final Decision and Order.*

The second issue on appeal is whether the trial court abused its discretion in failing to vacate the jury's verdict and to order a new trial. After trial, Quad-C moved to vacate the jury's verdict because of the trial court's evidentiary exclusions mentioned above, and because Ms. Boettger only presented rebuttal evidence to the jury that she could not work *full-time*. However, the issue on appeal was whether or not she could work *part-time*. While Quad-C presented three medical witnesses who all testified she could work part-time, Ms. Boettger failed to rebut that evidence. Therefore, there was insufficient evidence to uphold the jury's verdict that she was temporarily totally disabled and unable to work at least *part-time*.

The trial court's errors cited above are abuses of discretion and mandate vacation of the jury's verdict and a new trial.

II. ASSIGNMENTS OF ERROR

Failure to Inform Jury of Prior Fact of Employability

1. Was the Trial Court's Order Re: Plaintiff's Motions *in Limine* and oral ruling denying Plaintiff's Motions *in Limine* No. 1, dated November 18, 2015, an abuse of discretion? (CP at 649-651; November 18, 2016 RP at p. 4, l. 10 – p. 16, l. 16)

2. Was the Trial Court's oral denial of Plaintiff's Motion to Reconsider its November 18, 2015 denial of Plaintiff's Motion *in Limine* No. 1, an abuse of discretion?

3. Was the Trial Court's oral affirmation of its decision to deny Plaintiff's Motion *in Limine* No. 1, dated November 23, 2015, an abuse of discretion? (November 23, 2016 RP at p. 3, l.9 – p. 5, l. 11)

4. Was the Trial Court's failure to give Plaintiff's Proposed Jury Instructions No. 5A, 6, or 6A, on November 23, 2015, an abuse of discretion? (CP at 661-663; November 23, 2015 RP at p. 7, ll. 2-21)

Failure of Court to Distinguish Part-time and Full-time

5. Was the jury's verdict supported by substantial evidence to affirm the Board's decision and thus the Court's Order Denying Chunyk & Conley Quad-C's Motion to Vacate Verdict and Judgment, and/or for New Trial, dated April 22, 2016, appropriate? (CP at 703)

III. STATEMENT OF THE CASE

Ms. Boettger was a nurse employed by Orchid Park, a rehabilitation center, owned and operated by Quad-C. (CP at 15). She injured her back while she assisted a resident ambulate on January 22, 1998. (*Id.*). Despite her injury, Ms. Boettger continued to work at Orchid Park until early 2004 when she quit due to a conflict with one of her

supervisors. (*Id.*). In February of 2004, Ms. Boettger underwent back surgery to treat her back injury she suffered in 1998. (*Id.*).

Ms. Boettger Approved for Part-Time Work

On July 21, 2006, Ms. Boettger's treating occupational medicine physician Dr. Michael McManus released her to work from a physical perspective on a part-time basis; 4 hours per day, 5 days per week. (CP at 196-202). After she was released to work by Dr. McManus, Ms. Boettger was offered a job at Heritage Rehabilitation[1] working part-time as a Restorative Coordinator for 4 hours a day, 5 days a week. (CP at 191-192). Dr. McManus specifically approved of this job as it complied with the physical limitations that he set out for her related to her back condition. (CP at 196-202). However, she declined that job offer. (CP at 410, ll. 25-26).

In August of 2006, Ms. Boettger was diagnosed with depression by her treating psychiatrist Dr. Michael Pearson. The following month, a mental independent medical examination was completed by psychiatrist Dr. Richard Schneider. (CP at 131-144). After his examination, Dr. Schneider determined that Ms. Boettger was able to work from a psychiatric perspective part-time for 4 hours per day, 5 days per week. (CP at 487-88). Similarly to Dr. McManus, Dr. Schneider's work

[1] At that time, Chunyk & Conley/Quad-C was no longer in business and unable to offer her a job. Therefore, they worked with a vocation rehabilitation specialist to locate a substantially similar position that would accommodate her condition.

limitations complied with the position she was offered at Heritage Rehabilitation as a Restorative Coordinator. (*Id.*)

Despite being released to work and offered a job that complied with both Drs. McManus and Schneider's limitations of part-time employment, Ms. Boettger did not accept the employment offer. (CP at p. 410, l. 25 – p. 411, l. 21). She did not seek any other future employment. (*Id.*).

Claim, Board Appeal, and Jury Decision

Instead of accepting the employment offer, Ms. Boettger filed a claim with the Department seeking time-loss benefits for the time period of August 19, 2006, through October 23, 2006. The Department issued an Order that granted her time-loss benefits for that time period. Because Ms. Boettger was released to work part-time, Quad-C appealed the Department's Order to the Board, which upheld the Department's Order awarding time-loss benefits. Therefore, Quad-C appealed the Board's decision to Pierce County Superior Court.

This case was tried in August 2009. After listening to the Certified Record from the Board – including Drs. McManus and Schneider's testimony that released Ms. Boettger to work part-time – a jury unanimously overturned the Board's decision affirming the Department's Order. (CP at 87). Specifically, the jury found that Ms. Boettger was **not**

temporarily totally disabled from August 19, 2006, through October 23, 2006, and thus not entitled to time-loss benefits.[2] (*Id.*).

New Claim, Later Time Period

Thereafter, Ms. Boettger filed an additional time-loss claim with the Department. (CP at 145). This claimed time loss period was for October 24, 2006 – the day following her previous claim for time-loss benefits – through September 27, 2010, which is the time-loss period at issue on this appeal. (CP at 5). While this new claim was for a different time period, it is indisputably based on the same industrial injuries, her back and depression. (*Id.*). Despite the fact that Ms. Boettger's medical records indicate that her depression *improved* and her back injury was *stable* during this new time-loss period, the Department again issued an Order awarding her time-loss benefits. (CP at p. 103, ll 16 – 18; p. 104, l. 14 – p. 105, l. 12; 145). Because Ms. Boettger presented no evidence that her accepted condition changed – in fact the only evidence presented suggested that her condition improved – and that she could not work *part-time* on October 23, 2006, Quad-C appealed the Department's Order to the Board. (CP at 166).

Quad-C requested that the August 2009 verdict be an exhibit to the Board proceedings, or that the Board should include in its Findings of Fact that Ms. Boettger was not temporarily totally disabled from August 19,

[2] This is referred to as the August 2009 verdict.

2006, to October 23, 2006. (CP at p. 367, l. 10 – p. 370, l. 13). This request was made because the August 2009 verdict was not appealed, was accepted by the Department, was thus the law of the case, was now procedural history, and established that Ms. Boettger was not temporarily totally disabled the day before this time-loss claim was applicable. (*Id.*) Any decision of her ability to work on October 24, 2006, should take into account what her physical and mental condition was heading into this time-loss period. Most significant, the Board was aware of this factual background. (CP at 5).

Administrative Law Judge Timothy Wakenshaw denied Quad-C's request to admit the verdict form as an exhibit, though he stated that he took judicial notice of the verdict and its factual consequences. (CP at p. 367, l. 10 – p. 370, l. 13). However, the Proposed Decision and Order and the final Decision and Order from the Board upheld the Department's Order awarding time-loss benefits and did *not* include in the Findings of Fact that Ms. Boettger was not temporarily totally disabled on October 23, 2006. (CP at 4; 20).

Appeal to Trial Court, Again

Quad-C filed another appeal to Pierce County Superior Court, which is where this appeal originates from. During motions *in limine* prior to trial in Pierce County, Quad-C moved the Court to either admit the August 2009 verdict form into evidence or add the fact that Ms. Boettger

was not temporarily totally disabled on October 23, 2006, to the Findings of Fact to be read to the jury. (CP at 604-05). The trial court denied Quad-C's motion. (CP at 649; November 18, 2016 RP at p. 4, l. 10 – p. 16, l. 16).

During trial the only evidence presented to the jury was the Certified Record from the Board, which was read into the record verbatim.[3] Because the trial court excluded evidence that Ms. Boettger was not temporarily totally disabled on October 23, 2006, the jury was never informed of this established fact, even though the Board *was* aware of this when they rendered their final Decision and Order.

Quad-C offered the testimony of three medical witnesses: occupational physician Dr. McManus, physiatrist Dr. Thomas Williamson-Kirkland, and psychiatrist Dr. Schneider. (CP at 503, 246, 349). All three of these witnesses testified that Ms. Boettger could work *part-time*, which was the issue on appeal. (CP at 506, 277, 351-52). In addition, Quad-C presented the testimony of Loren Forsberg, a vocational rehabilitation expert who found the Restorative Coordinator job for Ms. Boettger at Heritage Rehabilitation. (CP at 312). Ms. Boettger presented testimony from only one medical professional; her treating psychiatrist Dr. Michael Pearson. (CP at 516). However, Dr. Pearson only testified that Ms. Boettger could not work *full-time*; he never testified that she could not

[3] Objections taken during testimony presented to the Board were ruled on by Judge Sorensen and the transcripts were redacted according to his rulings.

work *part-time*, which was the only issue on appeal. (CP at p. 522, ll. 20-25, p. 528, ll. 6-9, p. 539, ll. 1-13). Thus, Ms. Boettger failed to present any medical evidence to rebut the clear testimony of Drs. McManus, Williamson-Kirkland, and Schneider that Ms. Boettger could work *part-time* from October 24, 2006, through September 27, 2010 and was thus employable.

Moreover, Quad-C requested the trial court adopt at least one of their three proposed jury instructions to inform the jury that Ms. Boettger was not temporarily totally disabled on October 23, 2006:

- First proposal, 5A: amend the "Findings of Fact" to include that Ms. Boettger was not temporarily totally disabled on October 23, 2006,
- Second proposal, 6: instruct the jury on the law of the case and the prior jury verdict that determined Ms. Boettger was not temporarily totally disabled on October 23, 2006, or
- Third proposal, 6A: an alternative to No. 6 excluding the fact there was a prior jury verdict.

(CP at 661-663; November 23, 2015 RP at p. 7, ll. 2-22). The trial court denied Quad-C's proposed jury instructions and Quad-C took exception to the court's ruling. (CP at 676; November 23, 2015 RP at p. 7, ll. 2-22).

In the dark about Ms. Boettger's status from August 19, 2006 through October 23, 2006, the jury could not fairly decide the employability issue and returned a 10-2 verdict in favor of Ms. Boettger.

Post-Trial Motions

After Judgment was entered, Quad-C filed a Motion to Vacate the Jury's Verdict and Judgment and/or for a New Trial. (CP at 703). The basis of this motion was twofold; first, the trial court excluded evidence and jury instructions informing the jury of the established fact that Ms. Boettger was not temporarily totally disabled on and before October 23, 2006, and second, because Ms. Boettger did not present any evidence that she could not work *part-time* during the time period at issue there was not sufficient evidence to uphold the jury's verdict. (*Id.* at 704-710). The trial court denied Quad-C's motion. (CP at 753).

Therefore, Quad-C appeals the following trial court decisions:

- All evidentiary rulings that withheld the fact that Ms. Boettger was not temporarily totally disabled on October 23, 2006,
- Refusal to adopt jury instructions informing the jury of the fact that Ms. Boettger was not temporarily totally disabled on October 23, 2006, and
- Denial of Quad-C's Motion to Vacate the Jury's Verdict and Judgment and/or for a New Trial based on the same evidentiary and jury instruction rulings outlined above and Ms. Boettger's failure to rebut Quad-C's evidence that Ms. Boettger could work *part-time*, which was the only issue at trial.

These rulings by the trial court were abuses of discretion that materially affected the outcome of the jury's verdict and warrant a new trial.

IV. STATEMENT OF ARGUMENT

The trial court abused its discretion in denying Quad-C's Motion in Limine No. 1 dated November 18, 2015 (CP at 649-651; November 18,

2016 RP at p. 4, l. 10 – p. 16, l. 16), denying Quad-C's Motion to Reconsider its November 18, 2015 ruling denying Quad-C's Motion *in Limine* No. 1, and oral affirmation of its decision to deny Quad-C's Motion *in Limine* No. 1, dated November 23, 2015 (November 23, 2016 RP at p. 3, l.9 – p. 5, l. 11). Also, the trial court abused its discretion in failing to give at least one of Quad-C's Proposed Jury Instructions: 5A, 6, or 6A. (CP at 661-663; November 23, 2015 RP at p. 7, ll. 2-22).

Finally, Quad-C seeks reversal of the trial court's denial of their Motion to Vacate Verdict and Judgment and/or for New Trial, dated April 22, 2016, because the verdict was not supported by substantial evidence. (CP at 703). Because these abuses of discretion by the trial court were prejudicial to Quad-C and materially affected the jury's deliberations and verdict, Quad-C seeks a reversal and remand to the trial court for a new trial.

V. ARGUMENT

1. The trial court erred in failing to admit the verdict form dated August 5, 2009, or in the alternative, to instruct the jury with Quad-C's Proposed Jury Instructions No. 5A, 6, or 6A, and failing to amend the Board's "Findings of Fact" to include the accepted, determined fact that Ms. Boettger was not temporarily totally disabled between August 19, 2006 and October 23, 2006.

On August 5, 2009, a jury issued a verdict that found Ms. Boettger was not temporarily totally disabled and thus employable from August 19, 2006, until October 23, 2006. (CP at 87). Thus, she was not due any time

loss benefits.[4] (*Id.*). The trial court's final Order dated August 5, 2009, was filed with the Department and no time loss was allowed for that time period. Subsequently, Ms. Boettger filed another claim for time-loss benefits, beginning on October 24, 2006 through September 27, 2010. (CP at 145). After the Department issued an Order awarding time-loss for this subsequent period, Quad-C appealed to the Board because they were unaware of any change in Ms. Boettger's condition since the time period at issue in the prior appeal, ending the day prior to her current claim.

During the appeal to the Board, Quad-C moved on multiple occasions to admit the August 2009 verdict, or at the very least to ensure that the fact of employability was included on the Board's "Findings of Fact" contained in their final Decision and Order. The Board denied Quad-C's request to make the verdict an exhibit, but noted it was likely the law of the case and he would take judicial notice of it. (CP at p. 367, l. 10 – p. 370, l. 13). Specifically, Judge Wakenshaw said:

> I think, that the law of the case might be that, as indicated, that there was a previous judgment regarding a previous period of time-loss. And, I think, I can take judicial notice of what happened in the superior court case, but I am not going to made that an exhibit, because I don't think that would be appropriate....

(CP at p. 369, ll. 10-16). However, once the Board rendered their final Decision and Order upholding the Department's Order, the "Findings of Fact" did not include the fact that Ms. Boettger was not temporarily totally

[4] This decision was not appealed to the Court of Appeals.

disabled from August 19, 2006 to October 23, 2006. Quad-C appealed the Board's Proposed Decision and Order and final Decision and Order to Pierce County Superior Court.

Prior to trial in Pierce County, Quad-C moved to allow the August 5, 2009, factual determination that Ms. Boettger was not temporarily totally disabled on October 23, 2006, to be admitted as an exhibit, amend the "Findings of Fact", and/or to adopt one of their proposed jury instructions so that the jury would be made aware of this established fact in some form. (CP at 604-05; November 18, 2016 RP at p. 4, l. 10 – p. 16, l. 16). Quad-C's basis was threefold:

1. The August 2009 verdict was the law of the case as noted by Judge Wakenshaw;
2. The Board was aware that Ms. Boettger was not temporarily totally disabled from August 19, 2006 to October 23, 2006, despite the fact that it was not included in their findings of fact, and the appellate body, the jury, should be aware of it; and
3. The determined fact that Ms. Boettger was not temporarily totally disabled from August 19, 2006 to October 23, 2006, should be added to the "Findings of Fact".

(*Id.*) Quad-C was agreeable to either admitting the August 2009 verdict form (an offered exhibit denied by the Board) to add this fact to the "Findings of Fact", and/or to adopt one of their proposed jury instructions to inform the jury that Ms. Boettger was not temporarily totally disabled on October 23, 2006. (*Id.*) The trial court denied all of Quad-C's motions and proposals. (November 18, 2016 RP at p. 4, l. 10 – p. 16, l. 16). Thus,

the established fact – the law of the case – that Ms. Boettger was not temporarily totally disabled from August 19, 2006 to October 23, 2006, was willfully withheld from the jury. The result of this withholding of relevant substantive evidence was an inconsistent verdict in favor of Ms. Boettger.

The verdict was inconsistent because the jury was unable to properly adjudicate Quad-C's appeal because relevant evidence – the law of the case, of which the Board was aware – was withheld from them. How can a jury properly review the Board's decision when factual information the Board had was withheld from their consideration? The trial court's failure to present this fact to the jury in some capacity was unfairly prejudicial to Quad-C and denied their right to an appeal as authorized by RCW 51.52.110. Therefore, a new trial is necessary to correct this error.

A. *Law related to evidentiary rulings of trial court.*

The standard of review for a trial court's evidentiary rulings is an abuse of discretion. *Garcia v. Providence Medical Ctr.*, 60 Wn. App. 635, 642, 806 P.2d 766 (1991) (citing *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976)). An abuse of discretion has occurred when a trial court's evidentiary rulings are based on untenable grounds or untenable reasons. *Id.* at 642 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). If evidence presented by a

party tends to make the existence of a material fact more or less probable, the trial court must admit that relevant evidence. ER 401, 402. Relevant evidence is only excluded when the probative value is outweighed by an unfair prejudice or will confuse the jury. ER 403.

Once it is determined that a trial court has made an erroneous evidentiary ruling, the Court of Appeals must then decide "whether the error was prejudicial, for error without prejudice is not grounds for reversal." *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 728–29, 315 P.3d 1143 (2013) (quoting *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983)). If the error is determined to affect, or presumptively affect, the outcome of the case, then the error was prejudicial and harmful. *Brown*, 100 Wn.2d at 196.

Here, the trial court abused its discretion in denying relevant factual findings from the jury that caused an inconsistent verdict. These abuses of discretion were prejudicial and affected the outcome of the case.

B. *Prior decisions are the law of the case.*

"[A] decision rendered on a prior appeal, whether 'right or wrong,' becomes the law of the case." *Greene v. Rothschild*, 68 Wn.2d 1, 9, 414 P.2d 1013 (1966). That decision stays the law of the case unless there is a substantial change in evidence presented in a subsequent appeal. *State v.*

Worl, 129 Wn.2d 416, 425, 918 P.2d 905 (1996), *citing Folsom v. County of Spokane*, 111 Wn.2d 256, 263-64, 759 P.2d 1196 (1988).

Here, the jury was not properly informed of the law of this case: that Ms. Boettger was not temporarily totally disabled from August 19, 2006 to October 23, 2006 – immediately preceding the time-loss period at issue. This fact was established by a jury on August 5, 2009. (CP at 87). This situation is slightly unique from the case law cited above, as this action/appeal originates from a different underlying cause of action. However, both the August 2009 matter and this appeal emanate from the same facts, the same injuries, and the same evidence. Nearly all the evidence presented in this appeal – including the testimony of Ms. Boettger's witnesses – was identical to the evidence presented in the 2009 trial.[5] In addition, Ms. Boettger's own expert, Dr. Pearson, testified that Ms. Boettger's condition had actually *improved* from a mental health perspective since October 23, 2006. (CP at 558, ll. 11-13). Similarly, Quad-C presented the same witnesses and substantive testimony from Dr. Richard Schneider, Dr. Michael McManus, Dr. Thomas Williamson-Kirkland, and Loren Forsberg – a vocational rehabilitation expert. (CP at 506, 277, 351-52, 312).

[5] Ms. Boettger had one additional witness testify in this underlying matter that did not testify on 2009, Todd Gendreau, a vocational rehabilitation expert (unrelated to her medical or psychiatric condition). Ms. Boettger's husband, also testified briefly in the second case, but he added nothing substantive to the issues at bar.

When the 2009 jury rendered a decision originating from the same set of facts, the same industrial injury, and nearly identical evidence, that was a prior decision rendered on appeal and established the law of this case. Therefore, this jury should have been made aware of the fact that Ms. Boettger was not temporarily totally disabled on October 23, 2006. The trial court's evidentiary rulings withheld this from the jury.

The decision to withhold this evidence was based on untenable ground and was unreasonable – it ignored Washington State case law that says "[A] decision rendered on a prior appeal, whether 'right or wrong,' becomes the law of the case." *Greene*, 68 Wn.2d at 9. Therefore, the trial court abused its discretion in failing to properly inform the jury through some method – whether it be an amendment to the Findings of Fact, admitting the 2009 jury verdict, or a jury instruction – that Ms. Boettger was not temporarily totally disabled on October 23, 2006.

C. *The trial court's evidentiary rulings prevented the jury from considering the evidence of which the Board had knowledge; therefore, the jury was unable to properlyadjudicate Quad-C's appeal.*

In administrative law cases, employers have a statutory right to appeal a final Decision and Order made by the Board to the Superior Court. RCW 51.52.110. In an appeal to the Superior Court, it is appropriate for the court to receive evidence that was *offered* before the board, not just the certified record sent by the Board. RCW 51.52.115 (emphasis added). Indeed, to confirm or reverse the Board's decision, the

jury must determine whether or not the Board acted appropriately in construing the law and finding the facts. *Id.* In order for the jury to determine whether or not the Board's decision correctly construed the law and findings of fact, it is intuitive that the jury must be informed of the laws and the facts that the Board took into consideration.

Here, the trial court's evidentiary rulings withheld facts that the Board knew and took into consideration when rendering its decision. Specifically, the Board knew that Ms. Boettger was found to not be temporarily totally disabled on October 23, 2006. Administrative Law Judge Wakenshaw considered it and noted: "I think, that the law of the case might be that, as indicated, that there was a previous judgment regarding a previous period of time-loss. And, I think, I can take judicial notice of what happened in the superior court case...." (CP at p. 369, ll. 10-14). Though ignored in the Board's "Findings of Fact", the Board knew about this fact and took judicial notice of it. To be a true appeal in the Superior Court, the jury should have been informed of the historical fact as well. Yet, the trial court refused to transfer the Board's knowledge of this fact to the jury in some form. Without knowledge of the facts considered by the Board, the jury was unable to perform its function – to determine whether or not the Board acted appropriately in construing the law and finding the facts in coming to its decision.

The August 2009 verdict and finding of fact rendered by that verdict was clearly offered to the Board as evidence and should have been presented to the jury consistent with RCW 51.52.115. This was *not* new evidence. This was the law of the case that the trial court ignored but evidence of which the Board was aware. Therefore, it was an abuse of discretion to withhold this evidence from the jury and deprive Quad-C of their right to an appeal, the entire purpose of which was to determine whether or not the Board acted appropriately in construing the law and finding the facts.

D. *It was error to not include the fact that Ms. Boettger was not temporarily totally disabled on October 23, 2006 in the "Findings of Fact" for the jury's consideration.*

On appeal, the jury should be instructed in accordance with the facts underlying the claimant's claim for time-loss benefits. *Allison v. Dep't of Labor & Indus.*, 66 Wn.2d 263, 267, 401 P.2d 982 (1965). When certain issues are properly before the trial court by virtue of being included in the notice of appeal from the Board, they cannot be arbitrarily excluded from the jury's consideration. *Id.* Each party must be given an opportunity to present their theory of the case to the jury and the jury should be instructed in accordance with the facts. *Id.*

If the "Findings of Fact" from the Board are found to be incorrect, the trial court can substitute its own findings of fact to correct the error so that the jury is properly informed. *McClelland v. ITT Rayonier, Inc.*, 65

Wn. App. 386, 390, 828 P.2d 1138 (1992). A trial court has the authority to determine whether or not the Board's evidentiary rulings were appropriate. *Clark Cty. v. McManus*, 188 Wn. App. 228, 236, 354 P.3d 868, *rev. granted in part, denied in part*, 184 Wn.2d 1018, 361 P.3d 747 (2015), and *rev'd in part*, 185 Wn.2d 466, 372 P.3d 764 (2016).

Here, Ms. Boettger's first claim for time-loss for her industrial injury was for the time period of August 19, 2006 – October 23, 2006. After all avenues of decision and appeal were completed, the Department accepted and applied the August 2009 finding that Ms. Boettger was not temporarily totally disabled and thus employable in the week leading up to October 23, 2006. (CP at 87).

This claim for time loss is from October 24, 2006, the day after the time period the August 2009 verdict applied to, through September 27, 2010. However, both of Ms. Boettger's claims for time loss benefits are *based on the same facts, the same industrial injury, and the same depression* just a different time period. When Quad-C attempted to introduce the jury verdict and have it admitted as an exhibit (accept it as the "law of the case") to the Board, Judge Wakenshaw denied that request. While Judge Wakenshaw indicated that he would take the 2009 ruling that Ms. Boettger was not temporarily totally disabled on October 23, 2006, as judicial notice, he failed to put that fact in his Proposed Decision. (CP at p. 369, ll. 10-16; CP at 4, 20)

As a result of the Board's neglect in adding the fact that Ms. Boettger was not temporarily totally disabled from August 19, 2006 to October 23, 2006 to its "Findings of Fact", Quad-C filed a motion *in limine* prior to the appellate trial in Pierce County. (CP at 604-05). Quad-C argued that the Board should have included the fact that Ms. Boettger was not temporarily totally disabled on October 23, 2006 in its "Findings of Fact", or admitted the August 2009 verdict form, but it did neither. (*Id.*; November 18, 2016 RP at p. 4, l. 10 – p. 16, l. 16). Therefore, to remedy the Board's error, the trial court could have admitted the August 2009 verdict form as an exhibit, amended the Board's "Findings of Fact", or adopted one of Quad-C's proposed jury instructions on this issue. (*Id.*). It denied Quad-C's motion *in limine* and held that the fact Ms. Boettger was not temporarily totally disabled on October 23, 2006 could not be disclosed to the jury in any capacity at that time. (CP at 649-51; November 18, 2016 RP at p. 4, l. 10 – p. 16, l. 16; November 23, 2016 RP at p. 3, l.9 – p. 5, l. 11).

Prohibiting the jury from hearing a determined fact – and subsequently the Department of Labor and Industries had implemented that fact – that Ms. Boettger was able to work from August 19, 2006 to October 23, 2006, ignored a material fact of Ms. Boettger's claim. Ms. Boettger's ability to work, as determined by a jury and then ordered by the Department, was absolutely relevant to her employability and time-loss

benefits beginning the next day, October 24, 2006 – when nothing happened overnight. While a fact may be prejudicial to a party, it is still a fact that is directly on point – Ms. Boettger's employability the day before the current time-loss period is extremely relevant to her employability the following day. While not determinative to the jury, it is information that would help them determine Ms. Boettger's capabilities over the ensuing weeks, months, and perhaps years. The jury should have been given that history.

While the trial court ruled that a determination made on her employability for a prior time period/claim was not relevant to this time period, that is false. Her determined employability is more relevant than her other pre-existing conditions that the Board included in its findings of fact - including but not limited to her vision, pneumonia, COPD, diabetes, and intestinal difficulties. (CP at 21). According to the Board, they took into consideration Ms. Boettger's "age, education, work history, and pre-existing conditions" yet the established fact that her mental and physical condition on October 23, 2006, did not prohibit her from employment was excluded. (CP at 22). The trial court's failure to amend the Board's "Findings of Fact" was in error.

Moreover, the trial court did give an additional historical finding as a fact (allowance of Jury Instruction No. 15 – "depression has been determined" and was binding), which was *not* included in the Board's

procedural and factual history, thus acknowledging the trial court's ability to amend the "Findings of Fact" in some capacity. (CP at 694). Still, the trial court refused to give the jury the historical finding of the fact that it had been determined that Ms. Boettger was not totally disabled from August 19, 2006 to October 23, 2006. Giving one procedural fact not included in the Board's "Findings of Fact" but not the other was unfair, prejudicial, and error.

2. ***The trial court erred in failing to vacate the jury's verdict because Ms. Boettger failed to present any testimony that she could not work part-time.***[6]

During trial in Pierce County witness testimony presented to the Board was read to the jury. This testimony consisted of four witnesses from Quad-C: occupational treating physician Dr. McManus, physiatrist Dr. Williamson-Kirkland, psychiatrist Dr. Schneider, and vocational rehabilitation expert Loren Forsberg. Drs. McManus, Williamson-Kirkland, and Schneider all testified that Ms. Boettger could work *part-time*, which was the issue on appeal. (CP at 506, 277, 351-52). Further, there was evidence presented that a job matching her job limitations and part-time requirements was offered to Ms. Boettger through the testimony of Mr. Forsberg. (*Id.*; CP at 312).

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[6] After Judgment was entered at the trial court level, Quad-C moved to vacate the jury's verdict and/or for a new trial on two grounds: first, due to the evidentiary rulings it made related to the August 2009 verdict, and second, because Ms. Boettger failed to present any testimony that she could not work full-time. Because the first issue addressed in Quad-C's motion is addressed previously in this brief and the court's standard of review

The only medical witness that testified for Ms. Boettger was her treating psychiatrist, Dr. Michael Pearson. However, Dr. Pearson's testimony only related to whether or not Ms. Boettger could work on a *full-time* basis – which was not the issue on appeal. He never testified that Ms. Boettger could not work *part-time* or that she was not able to psychologically perform the tasks of the job offered Ms. Boettger, which she turned down. Therefore, Ms. Boettger's evidence failed to rebut the testimony of Drs. McManus, Williamson-Kirkland, and Schneider - that Ms. Boettger could work *part-time* from October 24, 2006, through September 27, 2010 and was thus employable.

A. *Law related to vacating verdicts and ordering new trials.*

The standard of review for a motion for a new trial is an abuse of discretion. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 81, 231 P.3d 1211 (2010). "A court abuses its discretion by denying a motion for a new trial where the verdict is contrary to the evidence." *Kadmiri v. Claassen*, 103 Wn. App. 146, 150, 10 P.3d 1076 (2000), *review denied* 142 Wn.2d 1029, 21 P.3d 291. Even when there is some conflicting evidence, if the verdict is not supported by the evidence or is against the weight of evidence, it is the trial court's duty to set it aside. *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 47 P. 738 (1897), *overruled on other grounds* in 17 Wash. 458, 50 P. 55.

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is the same (an abuse of discretion) it is not readdressed here in relation to their post-trial motion

A motion to vacate a jury's verdict and order a new trial is governed by CR 59. CR 59(a)(7) grants the trial court the authority to vacate a verdict and order a new trial if "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 727, 315 P.3d 1143 (2013) (*citing* CR 59). A mere "scintilla" of evidence will not suffice a trial court upholding the verdict; instead, there must be substantial evidence supporting the jury's verdict. *Day v. Frazer*, 59 Wn.2d 659, 661, 369 P.2d 859 (1962).

B. There was no evidence presented to the jury that Ms. Boettger could not work part-time; thus, the jury's verdict should have been vacated.

CR 59(a)(7) allows an amendment of the judgment (vacation of the verdict and judgment) or a new trial when "there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law." Here, Ms. Boettger did not present substantial medical evidence that she could not work at least part-time. That was the issue on appeal from the Board; her capacity to work *full-time* was not before the jury.

The only medical evidence presented by Ms. Boettger was from Dr. Pearson, who testified that from a psychological standpoint, Ms. Boettger could not work "full-time". He testified as follows:

> Q. [F]or the period of October 24th, 2006 through September 27th, 2010, did Patti's depression on a more

probable than not basis prevent her from obtaining and performing reasonable continuous *full-time* work?

A. Yes.

....

Q. Has she recovered enough or reached a point of stability long enough to be able to obtain and perform reasonably continuous *full-time* work?

A. I don't think so.

....

Q. And did those two diagnoses prevent Patti from being able to obtain and perform reasonably continuous *full-time* employment?

A. Yes.

...

Q. And if you could tell us in your opinion, your professional psychiatric opinion, what you know, in general you think the psychiatric barriers are for Patti in the able to perform – obtain and perform *full-time* work?

A. [B]oth major depressive disorder and pain disorder interfere with her ability to obtain and perform work.

(CP at p. 522, ll. 20-25, p. 528, ll. 6-9, p. 539, ll. 1-13). Dr. Pearson goes on to explain how Ms. Boettger is affected, but *never testifies about any part-time work limitations*. Moreover, he admits that she *improved* during the time period at issue on the claim and that he never told her she should not work. (CP at 558, ll. 11-13). The only inference that can be drawn from such testimony – Ms. Boettger's only medical testimony linking the psychiatric condition to the industrial injury – is that she cannot work *full-*

time, but that she can work *part-time*: (1) Ms. Boettger presented no evidence to the contrary; (2) she improved while he treated her; and (3) Dr. Pearson never told her she should not work.

This falls squarely into CR 59(a)(7):

- There is "no evidence" of part-time limitations.
- There is "no evidence" of total disability, as the jury found.
- There is "reasonable inference" of no full-time work only.

The jury's verdict was contrary to the evidence. And, because Ms. Boettger failed to meet her burden in showing that she could not perform part-time work, which job had been offered, the verdict of "totally disabled" is "contrary to the law". (*Id.*).

Ms. Boettger's counsel did not attempt to correct this, did not present his testimony on the issue before the jury, and did not present other medical evidence of any kind that her mental condition prevented her from consistently doing or even attempting part-time work.

Again, the trial court abused its discretion here because the record is devoid of the necessary substantial evidence to support Ms. Boettger's claim that she was totally disabled. The trial court's failure to vacate the jury's verdict was prejudicial to Quad-C – Ms. Boettger did not meet her burden of proof because she did not offer any testimony that she could not work part-time, the only issue on appeal. The evidence that she did

present, amounts to less than a "scintilla" of evidence and the jury's verdict should be vacated.

VI. CONCLUSION

The jury should have had substantively the same knowledge that the Board had when they issued their final Decision and Order. The duty of the jury was to determine whether or not the Board acted appropriately in construing the law and finding the facts. Without the same knowledge of the facts the Board had, the jury cannot perform its function as an appellate body. The trial court's multiple evidentiary rulings excluding this important historical fact from the jury were reversible errors; they were abuses of discretion that materially affected the jury's verdict and prejudiced Quad-C. Further, the jury incorrectly concluded that Ms. Boettger could not work part-time because Ms. Boettger never produced any rebuttal evidence to support this verdict.

For these reasons and those stated herein, Quad-C requests that the Court reverse the evidentiary rulings of the trial court and remand this matter for a new trial.

DATED this 22nd day of November, 2016, at Seattle, Washington.

JOHNSON, GRAFFE,
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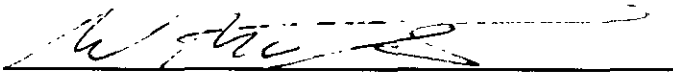

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the date signed below, I caused to be served in the manner indicated a true and accurate copy of the foregoing, **Appellant Chunyk & Conley/Quad-C's Opening Brief**, by the method indicated below and addressed to the following:

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